may appear harsh, the full cost of leased access must be borne by the party seeking access. Congress explicitly stated that implementation of leased access may not threaten the economic viability of cable operators. From a practical perspective, failure to guarantee payment for these costs would likely preclude small systems from borrowing funds to purchase the necessary equipment, making compliance with leased access rules impossible.

4. Operating Cost Adjustment.

Because of their higher operating costs, small systems should be permitted to factor into the rate calculation operating costs that exceed subscriber revenue. The Commission cites average monthly per channel costs at $0.46 which are offset by average subscriber revenue of $0.53.[30] The Commission previously computed these amounts for systems with more than and less than 15,000 subscribers. The Commission determined that the average subscriber revenue for small systems was $0.86, while only $0.44 for smaller systems.[31] Further, the Commission determined that small systems had higher operating costs and that per channel costs not exceeding $1.24 were presumptively reasonable.[32]

Many small operators charge rates below the maximum permitted rates. These operators chose to earn lower rates of return than they are legally entitled to earn in order to keep subscriber rates low. The Commission's proposed formula would confer this benefit to the leased access programmer. The Commission should require leased access programmers to pay for the difference between the actual cost, including reasonable profit

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[30]*Reconsideration Order* at fn. 115.

[31]*Small System Order* at ¶27.

[32]*Small System Order* at ¶54.

as provided by statute, and the amount charged to subscribers. Operators can derive this amount by subtracting revenue per channel from the per channel cost computed on Form 1230. The actual cost per channel should be included as the cost of operations for small systems, rather than using subscriber revenue as a surrogate.

5. Small Systems Have Fewer Premium Channels Included In The Average.

The Commission has previously noted that smaller systems tend to have fewer channels of premium services due to cost and technical constraints. While SCBA understands the Commission's logic in averaging leased access rates between channels formerly carrying tiered and channels formerly carrying premium non-leased access programming, still higher rates will result for larger systems because small operators will likely include fewer premium channels in their computation.

The relatively lower rate for smaller systems will tend to attract leased access programmers to smaller systems. Although SCBA does not necessarily advocate changing the rate averaging, it represents one more reason why the rates for leased access for small systems will be lower than for larger systems, reinforcing the need for special rules for small systems to ensure complete cost recovery.

6. Relief For Small Systems Owned by Small Companies.

SCBA recognizes that limiting the relief for small systems to those systems owned by small companies may be appropriate. Smaller systems owned by larger MSOs with corporate staffs capable of assisting with compliance and MSOs with greater access to capital to implement leased access requirements may not need the level of relief sought by SCBA. Consequently, if the Commission grants meaningful relief to small systems, SCBA

will not object if the Commission limits the relief to small systems owned by MSOs with more than 400,000 total subscribers.

B. Small Cable Should Be Allowed To Use Market Pricing.

As evidenced above, absent adoption of SCBA's recommendations and modification of the underlying formula, small cable will often be required to provide leased access for free or at a de minimis cost. Were access costs are so low, one or a few individuals can monopolize a system's leased access time. Others seeking access will pay market rate for access. This scenario does little to advance the statutory goal of increased program diversity.

Because the base leased access set-aside will quickly disappear to a few programmers, anyone else seeking leased access must pay market rates. SCBA suggests that the Commission simply adopt the market method of setting leased access rates for small cable systems. This methodology establishes compensatory rates for small operators. Small cable has not abused leased access in the past. If programmers believe a small cable operator has abused the system, they can refer the matter to the Commission for resolution. SCBA believes individual case adjudication is far more favorable than unnecessarily burdening the almost 8,000 small systems owned by small companies.

In all events, the Commission should permit small cable to use market pricing when the party requesting access is affiliated with the provider of a competing multi-channel video programming service. If the Commission requires small cable to adhere to the rate formula, a competing DBS or other provider could lease four or more channels at low or no cost and use the channels to promote their competing service. The prospect of this type of abuse is

real. The Commission must act to protect not only small cable, but subscribers of small cable from such unintended uses.

C. The Commission Should Consider The Special Needs Of Small Cable Even If It Changes Its Proposed Leased Access Cost Formula.

Even though SCBA has highlighted the special needs of small cable in this proceeding, SCBA has serious concerns about the viability of the entire leased access rate structure for the industry. SCBA strongly urges the Commission to consider the comments of the National Cable Television Association and its suggestions to revamp the rate structure. Any revised structure, however, must specifically address the unique needs of small cable to recover all transactional costs and obtain guaranteed payment of all technology costs as outlined by SCBA.

IV. SMALL CABLE SHOULD NOT BE REQUIRED TO IMMEDIATELY BUMP PROGRAMMING TO CREATE LEASED ACCESS CAPACITY.

Immediate and full implementation of leased access requirements on small cable will have a substantial disruptive affect on subscribers to those systems. Congress did not intend this effect. The Commission must implement leased access channel capacity requirements in a measured manner for small systems.

A. Congress Intended A Non-Disruptive Implementation Of The Leased Access Requirements.

Congress never intended leased access implementation to cause sudden or massive displacement of incumbent services. When Congress first established leased access requirements in the 1984 Cable Act, it specifically protected incumbent program offerings

from being bumped to provide leased access capacity.[33] Rather, operators were only required to provide leased access out of future channel capacity.[34] Further, Congress expressly contemplated that leased access be provided "in a manner consistent with the growth and development of cable systems."[35]

B. Phased Implementation For Small Cable Does Not Hinder Achieving Diversity In Programming.

Congress made clear that the 1984 Act sought to increase diversity in programming by mandating leased access:

> Leased access is aimed at assuring that cable channels are available to enable program suppliers to furnish programming when the cable operator may elect not to provide that service as part of the program offerings....[36]

Between 1992 and 1984, many large MSOs became vertically integrated with program providers, giving rise to new diversity concerns by Congress. Its findings in the 1992 Cable Act included:

> (4) The cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers.
>
> (5) The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over

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[33]47 U.S.C. Section 532(b)(1)(E).

[34]*Id.*

[35]47 U.S.C. Section 532(a).

[36]*1984 Joint Committee Report* at 47.

nonaffiliated cable operators and programming distributors using other technologies.

(6) There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.[37]

Small cable is not part of this pattern. Small cable is not vertically integrated. Small cable does not have vested interests in programming services. Even if it did, systems with 15,000 or fewer subscribers owned by companies with 400,000 or fewer subscribers, although comprising 66% of all cable systems nationally, serve only 12.1% of the national subscriber base.[38] Consequently, providing special treatment to lessen the burdens on small cable will not frustrate the Congressional goal of advancing diversity in programming.

C. Small Cable Did Nothing To Hinder Leased Access In The Past.

SCBA understands the Commission's perspective that affirmative advancement of leased access regulations may be required to mitigate perceived barriers to the provision of leased access. The Commission must recognize: small cable has erected no such barriers. A recent SCBA member survey demonstrated that most SCBA members had not received a single leased access inquiries over the past five years. Small cable has not resisted leased access. Rather, leased access providers have previously had no interest in small cable.

D. Leased Access Obligations Should Be Phased-In Over Time.

Because of the universal lack of interest on the part of leased access programmers, SCBA members provided programming to subscribers. Now, if the Commission sets rates that make placing leased access on small cable attractive, the disruption Congress sought

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[37]1992 Cable Act at §2(a)(4)-(6).

[38]*Small System Order* at ¶33.

to avoid in 1984 will be forced upon the subscribers to small cable. Small cable, through no fault of its own has been ignored by leased access programmers. If they now want to provide programming over small cable, the Commission should require carriage only on a phased-in basis to avoid mass disruption of program line-ups.

Small systems should be required to provide only a single channel of leased access programming initially. A cable operator should not be required to provide another leased access channel for a period of one year following the effective date of the rules. Each year, if the preceding channels have been fully programmed[39] for a consecutive six month period, then the system would have to provide another leased access channel, until it had filled its statutory quota. A phased approach to the provision of leased access requirements tracks with the statutory mandate that development be "in a manner consistent with growth and development of cable systems."[40]

Phased implementation will also advance Congress' goal of advancing the development of cable television. Many smaller systems have limited channel capacity.[41] Expansion of small systems is more difficult due to higher operating costs and restricted access to capital. Consequently, many small systems have 36 or fewer channels. If these systems upgrade and add five or ten channels, knowing that four or five will immediately be lost to leased access demands, small systems will lose the incentive to upgrade. Similarly, banks will not be willing to finance such upgrades. Stifling the growth and development of

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[39]As defined in Commission regulations.

[40]47 U.S.C. §532(a).

[41]Only 14% of all cable systems offer 54 or more channels according to Warren Publishing's *Television & Cable Factbook No. 64* at I-81.

small cable conflicts with the statutory objective of developing leased access "in a manner consistent with growth and development of cable systems."[42]

V. SMALL SYSTEMS NEED PROTECTION FROM INQUIRIES AND REQUESTS FROM THOSE WITH NO SERIOUS INTENT TO PURCHASE LEASED ACCESS CAPACITY.

A. Small Systems Cannot Provide Standardize Rate Cards.

In order for leased access rates to fully compensate small systems, as evidenced above, their calculation must include a variety of factors. These factors include the extent of the contract (i.e., full or part-time carriage), duration (how many weeks/months), the equipment necessary to receive and cablecast the leased access program (e.g., will the operator have to buy a new dish, receiver and modulator or tape deck and insertion machine).

The rate charged for leased access will depend on the legitimate costs a small operator incurs to provide carriage and the type of access the programmer seeks. This variability makes it impossible for a small system to either quote a meaningful flat rate or to provide the rate before the applicant provides all information necessary to ascertain the costs involved and the period over which they can be recovered.

B. Individualized Leased Access Rate Computations For Small Cable Requires Commission Modification Of Its Information Disclosure Rules.

In the *Reconsideration Order*, the Commission established rules requiring all cable operators, including small systems, to provide a leased access rate card within seven days

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[42] 47 U.S.C. §532(a).

of a request for the information.[43] Absent a detailed request for access, the operator cannot provide meaningful information because it will not have had an opportunity to calculate the rate appropriate for the particular leased access request.

Provisions of the leased access agreements to assure that leased access providers fully compensate small system will result in customized leased access arrangements. Consequently, small systems cannot provide potential leased access users with copies of contracts within seven days following request by a potential leased access programmer.[44]

The Commission will not have truly minimized the heavy burden on small cable until it removes the regulations mandating the almost immediate provision of meaningless information about leased access. The Commission should require small systems only to respond to those truly interested in providing leased access programming on small systems.

C. Regulations Should Mandate Provision of Information Only In Response To Bona Fide Requests For Leased Access.

The Commission should restrict small cable's obligation to provide any information about leased access to those with a real interest in possibly seeking access. To mandate provision of information to others wastes the limited resources of small cable and will ultimately result in higher prices for customers. The recent conduct of a potential leased access programmer highlights the need for this restriction. SCBA believes that Health Management Systems Inc. ("HMSI") sent leased access requests to most of the 11,500 cable systems, expressing an interest in "obtaining" all of the operators' leased access capacity.[45]

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[43]47 C.F.R. §76.970(e).

[44]*Id.*

[45]A copy of the notice is enclosed as Exhibit "A."

Most leased access programmers do not have the ability to concurrently negotiate and arrange for carriage on 11,500 cable systems.

The first time a small system must establish its leased access rates and determine its channel bumping plan, the system will incur substantial cost. Most small operators will need the assistance of outside counsel and consultants to determine the legitimate cost, terms and conditions of carriage. SCBA estimates that the out-of-pocket cost of responding to the first information request with rate, channel availability and a sample contract for that provider will average at least $3,000.

SCBA estimates the cost of initially establishing the leased access compliance mechanism for small systems at approximately $24 million.[46] While not suggesting that the Commission exempt small cable from leased access requirements, the Commission should impose any burdens with restraint because programmers have expressed virtually no interest in leased access on small systems over the past 11 years. A survey of SCBA members reveals that 74% have received no leased access inquiries during the past five years. Most of those receiving requests reported receiving the single letter from HMSI.

The request by HMSI demonstrates why the Commission must establish a threshold level of interest prior to triggering an information disclosure requirement.[47] If not, anyone

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[46]The Commission estimates that 66% of all cable systems (8,000) qualify for small system treatment. SCBA estimates that the cost of determining leased access plans at $3,000. Multiplying the cost per system ($3,000) by the number of affected systems.

[47]Not only was HMSI's request questionable, the tactics used by HMSI against one small operator were deplorable. Attached behind Exhibit B is a transcript of a message left by HMSI, threatening to have the operator fined up to $500 million if it did not provide access, even though the systems had fewer than 36 channels. These abuses against small cable operators are just the beginning.

via a mass, bulk rate mailing costing less than $2,000 could serve a letter to each cable system, triggering an expenditure of $24 million. If programmers who for the past 12 years have ignored small cable -- not even asked about availability -- are now interested, the Commission should require them to show a sincere interest in the possibility of actually leasing capacity, not just asking for information.

SCBA suggests the following system to control burdens imposed by frivolous requests for leased access information:

1. **Provide Information Regarding Availability.** Within 30 days of receiving an inquiry regarding leased access availability, a small system operator must provide a written response stating whether it has unused leased access capacity available.

2. **Programmer Deposit.** After receiving notice of leased access availability, a programmer seeking to further review leased access availability must make a $500 deposit with the small system to defray costs the small system may incur negotiating with the programmer and computing the leased access rates.

    a. **Use of Deposit.** The operator may deduct actual out-of-pocket costs directly incurred as a result of receiving and responding to the leased access request. The operator would offset costs incurred developing leased access channel designations and computing rates based on the needs of the specific programmer

against the deposit. The leased access rate computation would not include any transactional costs offset against the deposit.

b. **Return of Deposit.** If the programmer chooses not to lease access from the small system, the operator must return the amount of the deposit not used to offset costs incurred responding to the programmer's request.

The Commission may view the leased access deposit as burdensome on programmers. It is. Unreimbursed costs, however, incurred by small systems responding to multiple programmers creates an even greater burden. Both Congress and this Commission have made clear that the economic burdens of leased access shall not to fall on cable operators. Because the cumulative burden of multiple leased access requests can be disastrous for small cable, the deposit requirement must be adopted by the Commission.

VI. CUSTOMIZED RATE CALCULATIONS FOR SMALL CABLE MANDATE CHANGES IN LEASED ACCESS INFORMATION DISCLOSURE RULES.

The financial cost of implementing leased access burdens can overwhelm small cable. SCBA has set forth specific alternatives for the Commission to mitigate the adverse impact. The linchpin to limiting financial burden is limiting small cable response only to those inquiring who have a serious interest in providing leased access programming on a particular cable system. The current information disclosure regulations recently adopted by the Commission and currently under review by the Office of Management and Budget do not contain this important safeguard. To adopt alternatives that meaningfully reduce these unnecessary and illegal burdens, the Commission must conform its current information production regulations. We review these rules.

A. The Rules Adopted By The Commission Require Strict Compliance By All Operators.

The Commission mandated that all cable operators provide a leased access applicant with the following information within seven business days of the programmers's request:

1. A complete schedule of full and part-time leased access rates;
2. How much of its set-aside capacity is available;
3. Rates associated with technical and studio costs; and
4. If requested, a sample leased access contract.[48]

B. The Statutory Objective Can Be Accomplished Through Much Less Burdensome Alternatives.

The information reporting regulations adopted by the Commission require small operators to have a significant amount of leased access information available on short notice. Even a seven day response period imposes significant burdens on small cable, operators would not have a full seven days, and in many cases much less time to respond. The regulations measure the response period from the date the leased access programmer makes the request. Most requests are made via mail, taking several days off of the seven day period. One potential leased access programmer recently sent a leased access notice to all 11,500 cable systems via bulk mail. Bulk mail can often take more than a week to be delivered. Under the Commission's rules, an operator may have an obligation to respond to a leased access request upon receipt.

Even if small cable had the full seven days to respond, the short response period still requires that operators prepare their leased access plans prior to receiving a request for

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[48]47 C.F.R. §76.970(e).

access. For a small operator to prepare this information will require significant diversion of management time and the likely use of outside counsel and/or consultants at an estimated cumulative cost of $24 million.

Such massive efforts, replicated in thousands of small independently owned cable systems is unwarranted. The leased access rules have been in effect for 12 years. During this period, virtually no small systems ever received a single leased access request. To avoid this costly anticipatory effort, SCBA recommends that the Commission simply extend an operator's response time from seven to 60 days. This allows an operator time to respond to a request for leased access and avoids the need to prepare to answer a request that may never arrive.

C. The Commission Should Not Mandate Advanced Channel Designations For Small Systems.

The Commission proposes requiring operators to place in its public inspection file the identity of channels it will devote to leased access. The operators must also disclose all program changes and realignments contemplated. This requirement would require all operators to develop and plan their leased access strategy, triggering significant expenditures by small systems.

This requirement is overly broad as it applies equally to all cable operators. As documented in these comments, leased access programmers have largely ignored small cable. Most small systems never received any inquiries from potential leased access programmers. To all 11,500 cable systems to make advance preparation places unnecessary and unwarranted burdens on small cable. Small systems should only be required to prepare their leased access plans following receipt of a bona fide request.

VII. CONCLUSION

The Commission perceives the need to implement new regulations to create meaningful opportunities for leased access programmers. The regulations proposed, however, will apply across the board to all cable systems without regard to system size or culpability. Many of the burdens proposed create fixed burdens on each system. Consequently, per subscriber costs of the proposals are high for small systems. Furthermore, potential leased access programmers have virtually ignored small systems as a possible avenue to obtain access.

The Commission is required by law to consider the impact of its proposed regulations on small systems and operators. SCBA has set forth reasonable alternatives that will both mitigate the disparate burdens on small cable and achieve the statutory objectives established for leased access. SCBA strongly urges the Commission to adopt the alternatives it presents in these comments.

Respectfully submitted

Eric E. Breisach
Christopher C. Cinnamon
Howard & Howard
107 W. Michigan Ave., Suite 400
Kalamazoo, Michigan 49007
(616) 382-9711

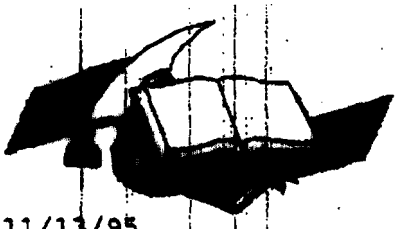
Attorneys for the
Small Cable Business Association

Dated May 15, 1996
\361\eeb\scba\scbala.com

EXHIBIT A

HEALTH MANAGEMENT SYSTEMS INC.
13738 OXBOW ROAD, SUITE 100
FORT MYERS, FLORIDA 33905
(813) 694-0207
(813) 434-6363

SIX



11/13/95

To Whom It May Concern;

This request fulfills the procedures required as set accordingly by title VI of the Cable Communications Part I of sec. 601 [47 U.S.C. 521] which establishes a national policy concerning cable communications and establishes guidelines for the exercise of Federal, State, and Local authority with respect to the regulating of cable systems. The standards established by this title are to encourage growth and development of cable systems, and provide the widest possible diversity of information sources and services to the public. The purpose is to promote competition in cable communication and minimize unnecessary regulation to assure that cable systems are responsive to the needs of the local community's interest. Section 602 [47 U.S.C. 522] covers activated channels combined with the title VI of the Communications Act of 1934 precedence set by 1984 Act of Cable Communications Policy; Public Law 98-549, 98 stat. 2780 Oct. 30, 1984. Under section 626 that authorizes the construction or operation of a cable system by a cable operator over a cable channel which is provided to multiple subscribers within a community. Section 612 [47 U.S.C. 532] requires a cable operator upon request, to fulfill an obligation of designating channel capacity for commercial use by persons unaffiliated with the operator in accordance with the following requirements. An operator of any cable system with 36 or more (but not more than 54) activated channels shall designate 10 percent of such channels which are not otherwise required for use by, or of in which the use is not prohibited by Federal Regulation or Law. An operator of any cable system with 55 or more (but not more than 100) activated channels shall designate 15 percent of such channels which are not otherwise required for use (or of which the use is not prohibited by Federal Law or regulation. An operator of any cable system with fewer than 36 activated channels is required to provide such channel capacity under the terms of a franchise when in effect on the date of the enactment of this title. This channel designation capacity compliance prevails under the State and Federal Agency Rules and Laws consistent with Sec. 612 [U.S.C. 532] (a). This request fulfills the necessities for obtaining these channels according to all Laws from the State and Federal Regulatory Authorities.

We will be expecting your positive reply shortly!

Respectfully:

Dr. Michael Weilert
C.E.O.
HEALTH MANAGEMENT SYSTEMS INC.

DMW/dmk

EXHIBIT B

Transcript of telephone message from
Dr. Michael Weilert, CEO, Health Management Systems
to Dan Skantar, Director of Communications, Star Cable

Dr. Weilert was responding to Skantar's letter dated 2/11/96

Please be aware that my attorney has a copy of your letter now, and you do fall under the particular licensure and franchise agreements within your particular states, with the Star Cable Associates, even though you have 35 or fewer channels. In regards you must provide 10% of those channels or else be fined a million dollars per day. 500 million dollars, and then lose your licence to quit operating as a cable operator in the cable system. I'm aware now that you have the letter and all violators will be officially prosecuted. If you need my number it's 813-694-0207. Thank you very much. If not we'll see you in the court.